

**STATE OF VERMONT
BOARD OF MEDICAL PRACTICE**

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|----------------|---|--------------|--------------|
| In Re: |) | MPC 15-0203 | MPC 110-0803 |
| |) | MPC 208-1003 | MPC 163-0803 |
| |) | MPC 148-0803 | MPC 126-0803 |
| |) | MPC 106-0803 | MPC 209-1003 |
| David S. Chase |) | MPC 140-0803 | MPC 89-0703 |
| |) | MPC 122-0803 | MPC 90-0703 |
| Respondent |) | | MPC 87-0703 |

**MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO
RECONSIDER**

Respondent David S. Chase ("Respondent") asks the Board to reconsider its order of August 17, 2004. In that order the Board declined to exclude the testimony of those patient-witnesses who do not grant Respondent unfettered access to their medical records and/or who do not submit to an independent eye-exam. Respondent, as he has from the inception of these proceedings, fails to grasp the parameters of the administrative process and the roles of the patient-witnesses in that process. Respondent does not provide to the Board any compelling basis for it to determine that its order of August 17, 2004 is in error and the Respondent's motion must be denied.

Respondent tries to make a fine distinction between compelling the patient-witnesses to comply with Respondent's requests (which Respondent claims he is not seeking) and excluding their testimony at hearing. Respondent's distinction is disingenuous. A decision by the Board excluding the testimony of patient witnesses is tantamount to coercing the patient-witnesses to comply with

Respondent's request. Such a decision by the Board places the State and the patient-witnesses in the position of choosing between complying with Respondent's requests or abandoning the charges related to those patient-witnesses. As argued at hearing the Board cannot make compliance with such requests as Respondent's a price for involvement in Board proceedings.

The patient-witnesses in this case are not parties like the plaintiffs in medical malpractice cases. Respondent seems unable to understand the fact that the charges in this case have not been brought by the patient-witnesses but by the State. The patient-witnesses have therefore not put their medical conditions at issue as do plaintiffs in medical malpractice cases. If the argument is that the patients have waived privilege by participation in these proceedings, the Respondent, months ago, could have subpoenaed the records he wishes. Respondent choose not to go that route but instead waited until two weeks before the scheduled hearing-on-the-merits to raise the issue of medical records.

That there are discrepancies between the testimony of patient-witnesses and Respondent's records is consistent with the State's allegations in the Superceding Specification of Charges that Respondent falsified records. The discrepancies between the testimony of patient-witnesses and Respondent's records cannot be resolved by granting Respondent unfettered access to records of the patient-witnesses. These discrepancies raise an issue of credibility that the Board must decide based on the testimony of the witnesses and Respondent, not the reference to other medical records.

As Respondent has acknowledged, there is no mechanism for forcing the patient-witnesses to undergo independent eye exams and therefore their testimony cannot be excluded for choosing not to undergo such examinations. Moreover, the independent eye-exams Respondent seeks would be irrelevant to the proceedings. One of the major issues in this case is what Respondent observed and recorded with respect to the patient-witnesses when he recommended cataract surgery. An examination years after Respondent's examination has no bearing on what Respondent diagnosed at that examination.


Finally, the Board's order does not eviscerate Respondent's due process rights as argued by Respondent. As the State has argued throughout, the Respondent's due process rights in this administrative proceeding are not as expansive as Respondent perceives them to be. Respondent is entitled to notice and a hearing where he may testify, present evidence and cross-examine witnesses. Due Process does not entitle Respondent to medical records of patient-witnesses in excess of what is in possession of the State and does not entitle Respondent to compel patient-witnesses to submit to eye exams.

The Respondent's motion must be **DENIED**.

Dated at Montpelier, Vermont this 20th day of August, 2004.

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